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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EUROSEMILLAS, S.A.,

Case No. 17-cv-3159-MEJ

Plaintiff,

v.

PLC DIAGNOSTICS, INC.; NATIONAL
MEDICAL SERVICES, INC.; LDIP, LLC;
REUVEN DUER; ERIC RIEDERS;
Does 1 - 10.

EUROSEMILLAS, S.A.'S REPLY TO THE OPPOSITION TO THE MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

Defendants.

Date: December 7, 2017

Time: 10:00 a.m.

Place: 450 Golden Gate Ave.
Courtroom B – 15th Floor
San Francisco, CA

Judge: Maria-Elena James

PLC DIAGNOSTICS, INC.; NATIONAL
MEDICAL SERVICES, INC.,

Counterclaimants,

V.

EUROSEMILLAS, S.A.

Counterdefendant.

AND RELATED THIRD-PARTY CLAIMS

LEGAL ARGUMENT

Plaintiff/Counterdefendant Eurosemillas, S.A. ("Eurosemillas") files this Reply to the Opposition to Eurosemilla's Motion to Dismiss filed by Defendants/Counterclaimants PLC Diagnostics, Inc. and National Medical Services, Inc. dba NMS Labs (collectively, "Defendants").

1. The counterclaims must be dismissed because Defendants failed to join iNDx Lifecare, Inc., an indispensable non-diverse party.

Defendants' Opposition makes abundantly clear that their counterclaims all arise from or relate to contractual obligations that iNDx Lifecare, Inc. (*"iNDx"*) owes them under the terms of the Intercreditor Agreement, Product Development Agreement (*"PDA"*) and License Agreement (*"NMS License"*).¹

That makes iNDx an indispensable party to this action under Federal Rules of Civil Procedure 19(b). iNDx must be joined as a party so that its interests are protected. The Ninth Circuit instructs that an indispensable party is anyone not party to a suit who is interested in the controversy and whose interest is such that a judgment or decree cannot be made without adversely affecting that interest. The non-joinder of an indispensable party is a fatal error and district courts cannot proceed to judgment in the absence of the indispensable party.²

Under Rule 19(a)(1)(B)(i), an absent party is necessary if it “has a *legally protected interest* in the suit” and “that interest will be *impaired or impeded* by the suit.”³ Alternatively, an absent party is also necessary if there is a potential risk

¹ Under Federal Rules of Civil Procedure 12(h), the defense of failure to join an indispensable party is never waived and can be raised at any time. *Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012) (holding that action may be dismissed at any time under Rule 12(h) for lack of subject matter jurisdiction).

² *State of Washington v. United States*, 87 F.2d 421, 427 (9th Cir. 1936).

³ *Makah Indian Tribe v. Verity*, 910 F.2d 55, 558 (9th Cir. 1990) (emphasis in original).

that adjudicating an action without the absent party could leave an existing party open to “incurring double, multiple, or otherwise inconsistent obligations.” Fed. R. Civ. P. 19(a)(1)(B)(ii).

Whether an action may proceed without an indispensable party depends on: (1) the extent a court's judgment could prejudice the absent party or the parties before the court, (2) the extent a court could act to relieve any prejudice, (3) whether judgment can be adequate in the party's absence, and (4) whether the plaintiff could have adequate relief if the cause of action is dismissed. Fed. R. Civ. P. 19(b)(1)-(4). All four factors weigh in favor of dismissing the counterclaims.

A judgment rendered in this action will affect iNDx's interests because the Court will be called on to adjudicate whether and to what extent iNDx has not performed its obligations under the Intercreditor Agreement, PDA and NMS License Agreement.

The Court's ability to render an adequate judgment is further complicated by the default judgment discussed below that NMS obtained against iNDx.

More importantly, joining iNDx as a party will divest this Court of diversity jurisdiction.⁴ iNDx is headquartered in California. Accordingly, Defendants must pursue their claims against Eurosemillas and iNDx in the state courts of California, which can provide adequate relief.

2. The third counterclaim by NMS against Eurosemillas is barred by res judicata.

NMS obtained a default judgment against iNDx for breach of the PDA and NMS License Agreement. *See* Request for Judicial Notice, dated November 22, 2017 ("RJN") Exhibit B and Exhibit C.

⁴ *Biagro W. Sales Inc. v. Helena Chem. Co.*, 160 F. Supp. 2d 1136, 1141 (E.D. Cal. 2001) (“The Ninth Circuit has held that a court should grant a 12(b)(7) motion to dismiss only if the court determines that joinder would destroy jurisdiction and the nonjoined party is necessary and indispensable.”).

1 The complaint NMS filed against iNDx (the “*iNDx Action*”) nowhere
 2 alleges that Eurosemillas induced iNDx to breach these two contracts or
 3 disrupted their performance. *See RJD Exhibit A.*

4 NMS should have joined Eurosemillas in the iNDx Action as a necessary
 5 and indispensable party. Issues regarding the nature, scope and cause of the
 6 alleged breach or disruption of performance of the PDA and NMS License
 7 Agreement cannot be relitigated because a default judgment “is considered to be
 8 a determination on the merits for purposes of *res judicata*.⁵

9 3. New allegations in an opposition brief cannot cure the defective
 10 counterclaims.

11 Defendants attempt to cure their defective counterclaims in their
 12 Opposition to the Motion to Dismiss with new and different allegations that
 13 nowhere appear in their counterclaims. “Additional information contained in an
 14 opposition to a motion to dismiss does not cure the defects in Plaintiff’s original
 15 pleading.”⁶

16 The following allegations and averments that Defendants make for the first
 17 time in their brief should be disregarded:

- 18 - Before and after the foreclosure, Plaintiff has conducted
 19 meetings with potential buyers and partners and what it has
 20 described as “key opinion leaders” and made unknown
 21 promises and representations about the IP that may adversely
 22 affect its commercial exploitation and development, and impede
 23 fundraising by clouding title to the IP.⁷

25 ⁵ *Howard v. Lewis*, 905 F.2d 1318, 1323 (9th Cir. 1990).

26 ⁶ *Rivas v. New Century Mortg. Corp.*, 2010 U.S. Dist. LEXIS 4777, *8 (S.D. Cal.
 27 2010).

28 ⁷ *Opposition* (p. 9: 22-27).

- 1 - Intrinsically, as well, the cloud on title to the IP created by
2 Plaintiff's wrongful assertion of ownership rights impairs the
3 ability to raise funds for its commercial exploitation.⁸
4
5 - Plaintiff has held meetings with potential customers and key
6 opinion leaders ("KOLs").⁹

7 For the reasons stated above and in the Motion to Dismiss, Defendants'
8 counterclaims should be dismissed without leave to amend.

9 Dated: November 21, 2017

10 Respectfully submitted,

11 

12 Sherrett O. Walker

13 Counsel for Eurosemillas S.A.

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27 ⁸ Opposition (p. 15: 1-3).

28 ⁹ Opposition (p. 15: 12-13).

CERTIFICATE OF SERVICE

I hereby certify that the above document was filed electronically with the Clerk of the United States District Court for the Northern District of California, and was served via hyperlink generated by the court's CM/ECF system, which was sent electronically to:

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I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Dated: November 21, 2017

Sherett Walker

Sherrett O. Walker